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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15 IN RE: HIGH-TECH EMPLOYEE
16 ANTITRUST LITIGATION

17 THIS DOCUMENT RELATES TO:
18 ALL ACTIONS
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Master Docket No. 11-CV-2509-LHK

**GOOGLE'S RESPONSE IN SUPPORT
OF PLAINTIFFS' ADMINISTRATIVE
MOTION TO SEAL PORTIONS OF
PLAINTIFFS' MOTION TO COMPEL
GOOGLE DOCUMENTS AND THE
DECLARATION OF DEAN M.
HARVEY IN SUPPORT THEREOF**

Pursuant to N.D. Cal. Civ. L.R. 7-11 and 79-5, Defendant Google Inc. (“Google”) hereby responds in support of Plaintiffs’ Administrative Motion to Seal, Pursuant to Civil Local Rule 79-5(d), Portions of Plaintiffs’ Motion to Compel Google Documents and the Declaration of Dean M. Harvey in Support Thereof (Dkt. 279). In accordance with the Motion to Seal, Google seeks to seal the following information, much of which has already been ordered to be placed under seal pursuant to the Court’s January 15, 2013 Order Granting in Part and Denying in Part Motions to Seal (Dkt. 273):

- (i) Portions of Exhibits D and J to the Declaration of Dean M. Harvey in Support of Plaintiffs’ Motion to Compel and Plaintiffs’ Motion to Shorten Time (“Harvey Declaration”) (proposed redacted versions attached as Exhibits 1 and 2);
- (ii) Exhibits E, K, L and M (in their entirety) to the Harvey Declaration; and
- (iii) Portions of Plaintiffs’ Motion to Compel Google Documents (proposed redacted version attached as Exhibit 3).

This information has been designated Confidential or Attorneys-Eyes Only under the Stipulated Protective Order (Modified by the Court) (Dkt. No. 107). Google is filing the supporting declaration of Anne M. Selin to accompany its response in support of Plaintiffs’ Motion to Seal.

I. LEGAL STANDARD

Rule 26(c) of the Federal Rules of Civil Procedure provides broad discretion for a trial court to permit sealing of court documents for, inter alia, the protection of “a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). The Ninth Circuit has “carved out an exception to the presumption of access to judicial records for a sealed discovery document [attached] to a nondispositive motion,” where the requesting party shows good cause exists to keep the records under seal. *Navarro v. Eskanos & Adler*, No. C-06 02231, 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal. March 22, 2007) (citing *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (“[A] ‘particularized showing’ under the ‘good cause’ standard of Rule 26(c) will ‘suffice[] to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions.’”); *see also Pintos v. Pacific*

1 *Creditors Assoc.*, 565 F.3d 1106, 1115 (9th Cir. 2009) (“In light of the weaker public interest in
2 nondispositive materials, we apply the ‘good cause’ standard when parties wish to keep them
3 under seal.”).

4 5 **II. GOOD CAUSE EXISTS TO SEAL GOOGLE’S CONFIDENTIAL** 6 **INFORMATION**

7 The redacted portions of Exhibits D and J to the Harvey Declaration, the redacted
8 excerpts of Plaintiffs’ Motion to Compel Google Documents, and Exhibits E, K, L and M (in
9 their entirety) to the Harvey Declaration contain confidential and highly sensitive information
10 about Google’s compensation practices and its internal deliberations and business strategy
11 related to making counteroffers to Google employees who have received offers from other firms.
12 Google designated the foregoing information “Confidential” or “Attorneys Eyes Only” under the
13 Protective Order.

14 As the accompanying Declaration of Anne M. Selin demonstrates, the majority of this
15 information has already been ordered to be placed under seal pursuant to the Court’s January 15,
16 2013 Order Granting in Part and Denying in Part Motions to Seal (Dkt. 273). Declaration of
17 Anne M. Selin ¶¶ 2-8. Google keeps the sealed information confidential and the public
18 disclosure of this information would cause Google competitive harm by giving third-parties
19 (including individuals responsible for competitive decision-making) insights into confidential
20 and sensitive aspects of Google’s strategies, competitive positions, and business operations,
21 allowing these third-parties to potentially gain an unfair advantage in dealings with and against
22 Google. A significant portion of the sealed information is employee compensation data,
23 including data related to specific individuals. This type of information is regularly sealed
24 because of its confidential and private nature. *See Renfro v. Unum, et al.*, No. 09-2661, 2010 BL
25 104197 (N.D. Cal. May 10, 2010) (granting a motion to seal records containing plaintiffs’ salary
26 information); *Nettles v. Farmers Ins. Exch.*, No. C06-5164, 2007 WL 858060, at *2, 2007 BL
27 247444 (W.D. Wash. Mar. 16, 2007) (holding that salary review notices for third parties “who
28 have not chosen to have their salary history placed into the public record” could be sealed.);
EEOC v. Kokh, LLC, No. CIV-07-1043, 2010 U.S. Dist. LEXIS 82526, at n.1, 2010 BL 187807

1 (W.D. Okla. Aug. 09, 2012) (noting that portions of summary judgment materials were filed
2 under seal because they contained “confidential salary information”).

3 Similarly, compensation policies, practices and decisions are routinely subject to a
4 sealing order. *In re Wells Fargo Loan Processor Overtime Pay Litigation*, No. C 07-01841, at
5 *16, 2008 U.S. Dist. LEXIS 53616, 2008 BL 123131 (N.D. Cal. June 09, 2008) (noting that a
6 “compensation policy” was filed under seal); *Hertz Equip. Rental Co. v. Useda*, No. CV-10-
7 4953, 2010 BL 259718, at *2 (N.D. Cal. Nov. 02, 2010) (granting a temporary restraining order
8 to enjoin a former employee from using a company’s “confidential and/or trade secret employee
9 compensation information”).

10 In addition, good causes exists to seal confidential information relating to a company’s
11 internal business, recruiting or hiring practices, strategies and policies, including confidential
12 analyses of a company’s market position. *See* Fed. R. Civ. Proc. 26(c)(1)(G) (permitting sealing
13 of “a trade secret or other confidential research, development, or commercial information”);
14 *Krieger v. Atheros Commc’ns, Inc.*, Case No. 11-CV-00640, 2011 U.S. Dist. LEXIS 68033 at
15 *3-4 (N.D. Cal. June 25, 2011) (holding that a company could seal a presentation from its
16 investment adviser that contained “sensitive and confidential information, including long-term
17 financial projections, discussions of business strategy, and competitive analyses”); *Network*
18 *Appliance, Inc. v. Sun Microsystems Inc.*, Case No. C-07-06053, 2010 U.S. Dist. LEXIS 21721,
19 at *9 (N.D. Cal. Mar. 10, 2010) (sealing “internal information regarding [defendant’s] business
20 strategies and opportunities that were not widely distributed”); *see also TriQuint Semiconductor,*
21 *Inc. v. Avago Techns. Ltd.*, Case No. CV 09-531, 2011 U.S. Dist. LEXIS 143942, at *9 (D. Ariz.
22 Dec. 13, 2011) (granting motion to seal “market analysis information,” under “compelling”
23 reason standard applicable to dispositive motions, including a “spreadsheet tracking information
24 regarding potentially competitive products,” and other business strategy documents, such as
25 information relating to “product competitiveness, and market and technological opportunities
26 and risks”).

27 Additionally, good cause exists to seal information pertaining to Google’s recruiting
28 policies and practices that are proprietary business methods and/or trade secrets. This

1 confidential and commercially sensitive business information is non-public and should remain
2 confidential under Rule 26(c)(1)(G) (permitting sealing of “a trade secret or other confidential
3 research, development, or commercial information”); *see also* Cal. Civ. Code § 3426.1(d)
4 (defining trade secrets as information that “(1) Derives independent economic value, actual or
5 potential, from not being generally known to the public or to other persons who can obtain
6 economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable
7 under the circumstances to maintain its secrecy.”).

8 Good cause also exists for sealing the identities and personal contact information of
9 specific employees or applicants that are contained in certain exhibits to the Harvey Declaration.
10 These employees or applicants have not sought to make their identities known or placed in the
11 public record. *Nettles* at *2 (holding that the interests of private parties outweighed the public’s
12 right of access with respect to information pertaining to third party salary and employment
13 separation information).

14 **III. CONCLUSION**

15 For the foregoing reasons, Google respectfully requests that this Court order the redacted
16 portions of Exhibits D and J to the Harvey Declaration, the redacted excerpts of Plaintiffs’
17 Motion to Compel Google Documents, and Exhibits E, K, L and M (in their entirety) to be
18 placed under seal. In accordance with Civil Local Rule 79-5(d), a proposed order granting the
19 Administrative Motion to Seal Portions of Plaintiffs’ Motion to Compel Google Documents and
20 the Declaration of Dean M. Harvey In Support Thereof has been lodged with the Clerk in hard
21 copy and served on counsel for Plaintiffs. In accordance with Civil Local Rule 79-5(d),
22 Google’s proposed redacted version of the Motion to Compel Google Documents and Exhibits D
23 and J to the Harvey Declaration are being lodged with the Clerk in hard copy within a sealed
24 envelope.

1 Dated: January 23, 2013

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